RECORD AND BRIEFS

15-457

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

PARTIES TO THE PROCEEDINGS

The sole petitioner here (defendant below) is Microsoft Corporation.

In addition to the plaintiff-respondent identified on the cover, Jesse Bernstein, Matthew Danzig, James Jarrett, Nathan Marlow, and Mark Risk were also named plaintiffs below. With the exception of Jesse Bernstein, who dismissed his appeal, these individuals are also respondents here.

RULE 29.6 STATEMENT

Microsoft Corporation, a publicly traded company, has no corporate parent, and no publicly held company has an ownership interest of more than ten percent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Microsoft Corporation respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in No. 12-35946.

OPINIONS BELOW

The amended opinion of the Ninth Circuit (Pet. App. 1a) is published at 797 F.3d 607. The relevant order of the district court (Pet. App. 35a) is unpublished.

JURISDICTION

The Ninth Circuit issued its initial decision on March 18, 2015. The Ninth Circuit issued an amended opinion, simultaneously denying Microsoft's petition for rehearing en banc, on July 20, 2015. Pet. App. 1a, 5a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides in relevant part: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," and to certain "controversies."

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .."

28 U.S.C. § 1292(e) provides: "The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an

interlocutory decision to the courts of appeals that is not otherwise provided under subsection (a), (b), (c), or (d)."

Federal Rule of Civil Procedure 23(f) provides in relevant part: "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."

STATEMENT OF THE CASE

This case presents an important jurisdictional issue concerning class-action procedure that is now the subject of an entrenched circuit split.

1. In 2005, petitioner Microsoft Corporation released the Xbox 360 console. Widely popular with video game enthusiasts, the Xbox 360 became the first console of its generation to sell over ten million units in the United States. Among other things, the Xbox 360 spins game discs in its disc drive faster than its competition, creating "a better overall video-gaming experience." CA9 ER 219.

But like any device, the Xbox 360 has limits. As with turntables that spin vinyl records, the Xbox 360 may scratch discs spinning inside if moved too quickly in the wrong direction during operation. Microsoft therefore affixed a sticker on the front of each disc drive—covering the disc tray before first use—telling users in three languages: "Do not move console with disc in tray." And Microsoft's warranty promises only that, "under normal use and service," the Xbox 360 "will conform to the printed user instruction materials," CA9 ER 544; the user instruction materials in turn warn users to "[r]emove

discs before moving the console or tilting it between the horizontal and vertical positions" to avoid "damaging discs," CA9 ER 106, 273, 278.

In the years since the Xbox 360 went on sale, "only 0.4% of Xbox users have reported disc scratching." Pet. App. 6a.

2. In 2007—five years before this case was filed—seven Xbox 360 owners sued Microsoft in separate lawsuits, alleging "the Xbox optical disc drive is unable to withstand even the smallest of vibrations, and that during normal game playing conditions discs spin out of control and crash into internal components, resulting in scratched discs that are rendered permanently unplayable." Pet. App. 6a. Those plaintiffs sought damages both for game owners whose discs were scratched and for *all* Xbox 360 owners, on the theory that the console's supposed propensity to malfunction reduced the value of *all* Xboxes, thus breaching express and implied warranties.

Five cases were consolidated in the U.S. District Court for the Western District of Washington. After the parties developed a full evidentiary record, including expert testimony, through sixteen months of active discovery, the district court denied class certification. It began by noting that "the defect asserted by the Xbox owners actually manifest[ed] in fewer than one percent of the total number of consoles purchased." Pet. App. 7a (alteration in original; internal quotation marks omitted). The district court then reasoned that the need to consider causation and damages on an individual basis for consoles that allegedly scratched discs "preclude[d] the certification of the class of Xbox owners" and the

scratched-disc subclass. *Id.* 8a (alteration in original; internal quotation marks omitted).

The plaintiffs filed a petition in the Ninth Circuit seeking interlocutory review under Fed. R. Civ. P. 23(f). Rule 23(f) gives federal courts of appeals "unfettered discretion" to "permit an appeal from an order granting or denying class-action certification." Fed. R. Civ. P. 23(f); Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. They argued the class-certification denial "constitute[d] the 'death knell' for this litigation" because the individual claims were too small to justify litigating on their own to final judgment. Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 8. The Ninth Circuit denied the petition, CA9 ER 231, and the plaintiffs resolved their individual claims by an agreement with Microsoft. The district court then dismissed the consolidated cases with prejudice.

3. In 2011, the same lawyers as in the original consolidated litigation filed a new lawsuit—again in the U.S. District Court for the Western District of Washington—on behalf of respondents, a handful of Xbox 360 owners who did not sue in 2007. Respondents pressed the same claims as their predecessors and they likewise requested certification of a nationwide console class.[1] They argued the Ninth Circuit's intervening decision in

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[1] Respondents originally sought to certify a scratched-disc subclass as well. But they abandoned the scratched-disc subclass on appeal, Pltfs. CA9 Br. 18-20, recognizing their inability to prove on a classwide basis that the console, as opposed to user behavior, caused any particular disc scratch.

Wolin v. Jaguar Land Rover North America, LLC, 617 F.3d 1168 (9th Cir. 2010)—holding that proof of the manifestation of a defect is not a prerequisite to class certification and the typicality requirement in Fed. R. Civ. P. 23 "can be satisfied despite different factual circumstances surrounding the manifestation of the [alleged] defect," *id.* at 1175—now allowed certification of their proposed classes.

Microsoft replied that *Wolin* did not change the law relevant to this case. As a result, Microsoft maintained, the district court should show comity to the decision in the earlier case, which rested on the same allegations as this one. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 (2011) ("[W]e would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute."). Further, Microsoft explained, *Wolin* does not apply where, as here, only a minuscule fraction of the proposed class suffered any harm in the form of a manifestation of an alleged defect, and individual proof is necessary to determine whether any particular user's warranty was breached.

The district court struck respondents' class allegations. It found the reasoning in the first denial of class certification (by a different judge) persuasive and that "nothing in *Wolin* undermine[d] [that] causation analysis." *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1280 (W.D. Wash. 2012).

4. Invoking Fed. R. Civ. P. 23(f), respondents sought immediately to appeal the district court's order striking their class allegations. As in the previous case, respondents' counsel asserted that "[t]he small size of Plaintiffs' claims makes it

economically irrational to bear the cost of litigating this case to final judgment," such that, unless reversed, "the district court's order effectively kills this case." Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 18.

Relying on its unfettered discretion to grant or deny Rule 23(f) petitions, the Ninth Circuit denied the petition, and remanded the case back to the district court. Pet. App. 10a.

5. Instead of pressing their individual claims, respondents promptly moved on remand to dismiss their claims with prejudice. Respondents explained why they wanted such an order: "After the Court has entered a final judgment, Plaintiffs intend to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations." Pet. App. 36a.

Microsoft stipulated that the district court could dismiss respondents' claims. Pet. App. 36a. Microsoft made clear, however, that it believed "Plaintiffs will have no right to appeal the Court's Order striking Plaintiffs' class allegations after entry of their requested dismissal." *Id.*

The district court granted the dismissal with prejudice, "reserving to all parties their arguments as to the propriety of any appeal." Pet. App. 36a-37a.

6. The Ninth Circuit assumed jurisdiction over respondents' appeal and reversed. Relying on its holding several months earlier in *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), the court of appeals held that "in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal" of a class-certification denial. Pet. App. 12a (quoting *Berger*,

741 F.3d at 1064). Microsoft argued at length that *Berger* cannot be squared with this Court's holding in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), and that plaintiffs may not manufacture an immediate appeal by dismissing and thereby showing that a class-certification denial has in fact sounded the "death knell" of their claims. Def. CA9 Br. 4-16. But the Ninth Circuit responded simply that *Berger* controlled, refusing to question that prior holding. Pet. App. 11a-12a.

Turning to the class-certification denial itself, the Ninth Circuit held that the district court "abused its discretion when it struck the class action allegations." Pet. App. 19a. Relying on *Wolin*, the Ninth Circuit held that Rule 23 allows classes to be certified when plaintiffs characterize their claims as turning on "a common factual question—is there a defect?" and on whether that defect breaches a warranty. *Id.* 16a. It does not necessarily make any difference whether "the defect here may never manifest" or if it manifests for different users for different reasons. *Id.* 17a.

At the same time, the Ninth Circuit acknowledged that "Microsoft makes several arguments" besides the one adopted by the district court "to show that certification of this class would violate Federal Rule of Civil Procedure 23." Pet. App. 18a. The Ninth Circuit stressed, therefore, that it was "express[ing] no opinion on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Id.* 19a. Instead, it "suffice[d] for now to hold that . . . the district court misread *Wolin*" and

to remand for further proceedings concerning the viability of respondents' proposed class. *Id.* 18a, 19a.

7. Microsoft sought rehearing en banc. It argued that the Ninth Circuit's rule allowing plaintiffs to create appellate jurisdiction over class-certification denials by voluntarily dismissing their claims not only contravenes this Court's holding in *Livesay* but also conflicts with the law in a majority of the circuits to consider the issue. The court of appeals denied the petition without any judge requesting a vote. Pet. App. 5a.

8. This petition follows.

REASONS FOR GRANTING THE WRIT

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court held unanimously that plaintiffs may not force an appellate court to hear an interlocutory appeal from an order denying class certification. This is so, this Court explained, even if the plaintiffs demonstrate that the denial of class certification is the "death knell" of their case—that is, even if the denial effectively ends the litigation because it makes it "economically imprudent [for the plaintiffs] to pursue [the] lawsuit to a final judgment and then seek appellate review of [the] adverse class determination." *Id.* at 469-70.

Since *Livesay*, the courts of appeals have split five-to-two over whether plaintiffs faced with adverse class determinations may evade *Livesay*'s prohibition against mandatory interlocutory appellate review by voluntarily dismissing their claims, thereby purportedly creating an adverse final judgment.

This Court should grant certiorari here to resolve this conflict. The question is immensely important to

the proper administration of the class-action device. Further, this case is a particularly suitable vehicle for considering the question. It showcases the reasons why the voluntary dismissal tactic evades the carefully crafted rules governing appellate jurisdiction in class actions. Finally, the Ninth Circuit's holding that plaintiffs may create appellate jurisdiction through the voluntary dismissal tactic is wrong. The tactic is nothing more than the "death knell" doctrine dressed up in different garb—and it likewise circumvents the prerequisites for appeals contained in 28 U.S.C. § 1291 and Article III.

I. The Federal Courts Of Appeals Are Divided Over Whether Plaintiffs May Appeal An Order Denying Class Certification After Voluntarily Dismissing Their Claims With Prejudice.

As treatises and practice guides recognize, "[c]ourts disagree" on whether plaintiffs seeking to represent a class "may appeal from a judgment entered after a voluntary dismissal with prejudice." HON. A. WALLACE TASHIMA & JAMES M. WAGSTAFFE, FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 16:396 (2015); *see also* THOMAS SMITH & ELIZABETH WILLIAMS, 6 CYCLOPEDIA OF FEDERAL PROCEDURE § 23.46 (3d ed. 2015) (explaining that while some courts allow such appeals of decertification orders, "other courts consider this result untenable, because it allows the putative class representative to evade the policy against piecemeal review by waiving his or her individual claims"). Over half of the circuits have weighed in as follows:

1. Five circuits have held that a court of appeals lacks jurisdiction to review a denial of class

certification where the plaintiffs have voluntarily dismissed their claims with prejudice.

Not long after this Court issued its opinion in *Livesay*, the Tenth Circuit considered whether it had jurisdiction to review a denial of class certification where the plaintiff employed "the simple device of allowing the claim of [the] class representative to be dismissed for lack of prosecution." *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 801 (10th Cir. 1980). The Tenth Circuit held the situation was "governed by the Supreme Court's decision in *Livesay*." *Id.* at 800. The fact that "[t]he 'death knell' has indeed sounded"—as opposed to being merely foretold—does not create a "genuine distinction" from *Livesay* allowing jurisdiction. *Id.* at 800, 802.

The Third, Fourth, and Seventh Circuits have since adopted the same view. Reviewing a case in which the plaintiffs "voluntarily dismiss[ed] all of their claims" "to manufacture finality," the Third Circuit held that such a "procedural sleight-of-hand" does not create appellate jurisdiction. *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-47 (3d Cir. 2013). The Fourth Circuit likewise has held that "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification," a court of appeals "lack[s] jurisdiction to decide the issue whether the district court abused its discretion in denying the plaintiff['s] request for class certification." *Rhodes v. E.I. DuPont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *see also Himler v. Comprehensive Care Corp.*, 993 F.2d 1537 (4th Cir. 1993) (unpublished opinion) (same). And the Seventh Circuit has held that it "will . . . not review the

district court's refusal to certify a class" when "the plaintiffs requested and were granted a voluntary dismissal of their [] claims." *Chavez v. Illinois State Police*, 251 F.3d 612, 629 (7th Cir. 2001); *see also id.* at 621, 627 (recounting detailed procedural history of case).

The Eleventh Circuit has gone even further, holding that it has "no jurisdiction" whenever a plaintiff "appeal[s] from a final judgment that resulted from a voluntary dismissal with prejudice." *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1325-26 (11th Cir. 1999). It does not matter whether "[t]he dismissal with prejudice was requested only as a means of establishing finality in the case such that the plaintiff could appeal [an] interlocutory order—an order that the plaintiff believes effectively disposed of her case." *Id.* at 1326. Nor does it matter whether the interlocutory order did, in fact, "eliminate[] the plaintiff's claim." *Id.* at 1327 n.7. In either case, neither 28 U.S.C. § 1291 nor Article III permits the appeal. *Id.* at 1326-27. *Druhan* was not a class action, but courts have since confirmed that its categorical holding applies equally to class actions. *See Woodard v. STP Corp.*, 170 F.3d 1043, 1044 (11th Cir. 1999); *Kay v. Online Vacation Ctr. Holdings Corp.*, 539 F. Supp. 2d 1372, 1373-75 (S.D. Fla. 2008).

2. In direct contrast to these holdings, two circuits now hold that a named plaintiff's "voluntary dismissal with prejudice" creates "'a sufficiently adverse—and thus appealable—final decision'" for the plaintiff to obtain review of a class-certification denial. Pet. App. 12a (quoting *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065 (9th Cir. 2014)). Rejecting Microsoft's argument that this rule "flouts"

Livesay by "forc[ing] appellate jurisdiction whenever a plaintiff's counsel declares a death knell," Def. CA9 Br. 9; *see also id.* at 4-16, the Ninth Circuit pronounced here that, absent a settlement, a plaintiff's "stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal." Pet. App. 12a (quoting *Berger*, 741 F.3d at 1064).[2]

The Second Circuit similarly has held that named plaintiffs may secure appellate review of class-certification denials by precipitating entry of dismissals for failure to prosecute. *See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 178-79 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991).[3] The Second Circuit

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[2] The Ninth Circuit distinguished this scenario from *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), in which it held that a dismissal for failure to prosecute does not create appellate jurisdiction to review the denial of class certification. Some other circuits (understandably) had read *Huey* to apply when named plaintiffs voluntarily stopped pursuing a case to manufacture an appeal. *See, e.g., Bowe*, 613 F.2d at 801. But the Ninth Circuit clarified here that *Huey* applies only when the dismissal was necessary to preserve district courts' ability "'to achieve the orderly and expeditious disposition of cases,'" Pet. App. 12a n.4 (quoting *Huey*, 608 F.2d at 1239)—that is, when dismissal was occasioned not just by a desire to manufacture an appeal but also by plaintiffs' "dilatory" tactics, *Huey*, 608 F.2d at 1240; *see also Hutchins v. A.G. Edwards & Sons, Inc.*, 116 F.3d 1256, 1260 (8th Cir. 1997) (same rule). The plaintiffs here were not dilatory, nor did the plaintiffs act in a dilatory manner in any of the cases cited above in the conflict.

[3] The plaintiff sought certiorari to challenge the Second Circuit's affirmance of the district court's refusal to certify the class. The petition did not raise the question presented here.

deems *Livesay* "inapplicable" in this situation on the ground that "immediate appellate review will only be available to disappointed class representatives who risk forfeiting their potentially meritorious individual claims." *Id.* at 179; *see also Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (appellate review available in this situation because the denial of class certification "as a practical matter stop[s] the plaintiff's action altogether"). While sitting on the Second Circuit, then-Judge Sotomayor acknowledged that the Second Circuit's holding condoning the voluntary dismissal tactic "has been rejected by other circuits," and she suggested the rule might be infirm. *Shannon v. General Elec. Co.*, 186 F.3d 186, 193 (2d Cir. 1999). But the rule remains the law in that circuit.

3. This circuit split is now firmly entrenched. The Ninth Circuit refused to rehear this case en banc, Pet. App. 5a, perhaps taking solace in the fact that its view is seemingly endorsed by "[a] leading procedural treatise," *Berger*, 741 F.3d at 1065 (citing 7B CHARLES ALAN WRIGHT, ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1802, at 297-98 (3d ed. 2005)); *accord* Pet. App. 12a n.4. (The treatise cites only Second Circuit precedent; it does not mention the conflicting case law.) On the other hand, none of the circuits faithfully applying *Livesay* and Article III in this context have any reason to revisit their views—nor is there any realistic prospect that *all five* might do so. Only this Court can bring uniformity to this jurisdictional issue.

II. The Question Presented Is Exceptionally Important.

For the same reasons this Court in *Livesay* deemed the legitimacy of the "death knell" doctrine worthy of this Court's attention, the propriety of the voluntary dismissal tactic demands this Court's review.

1. "Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, at practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). Just as the "death knell" doctrine in *Livesay* threatened to upset this "vital" balance between trial and appellate courts, 437 U.S. at 476, the voluntary dismissal tactic is guaranteed to generate piecemeal appellate review. One need look no further than this case to appreciate the point. As the Ninth Circuit noted, "Microsoft makes several arguments to show that certification of this class would violate Federal Rule of Civil Procedure 23." Pet. App. 18a.[4] But the Ninth Circuit considered only one of those arguments, ultimately "express[ing] no opinion on whether the specific common issues

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[4] To take but one example, the Xbox warranty promised the console would "substantially conform to the printed user instruction materials," and those materials warned users not to move or tilt the console with a disc in the drive "[t]o avoid jamming the disc drive and damaging discs." CA9 ER 106, 273, 278. Individual proof is therefore necessary to determine any breach of warranty as to any particular console owner, especially given undisputed evidence showing only 0.4% reported scratched discs.

identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Id.* 19a.

As a result, if the district court denies class certification on remand, respondents may voluntarily dismiss again and force another appeal. If the Ninth Circuit reverses again, that process could repeat itself. And it could continue to repeat indefinitely. This potentially endless cycle enshrines piecemeal appeals as a litigation threat in proposed class actions.

2. The Ninth Circuit's voluntary dismissal rule gives plaintiffs an unfair advantage in class actions. Just as plaintiffs worry that a denial of class certification will sound the death knell for their case, "the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well. Certification of a large class may so increase a defendant's potential damages liability and litigation costs that [the defendant] may find it economically prudent to settle and to abandon a meritorious defense." *Livesay*, 437 U.S. at 476; *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail" because, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims"). Yet just like the "death knell" doctrine this Court rejected in *Livesay*, the voluntary dismissal tactic "operates only in favor of plaintiffs." 437 U.S. at 476. This one-way ratchet distorts litigation and settlement incentives in these high-stakes cases.

3. The increasing prevalence of nationwide class actions—and the particular attractiveness of the voluntary dismissal tactic in such cases—deepens the need for prompt review. As our economy has become less segmented and more national in scale, plaintiffs have increasingly sought to certify nationwide classes. The proposed nationwide class here, for example, may exceed 10 million people. Other examples abound of classes having a similar size and nationwide reach, especially in consumer cases with minimal per-person damages. *See, e.g., In re The NVIDIA GPU Litig.*, 539 F. App'x 822, 824 (9th Cir. 2013) (class of "about 5 million consumers" of computers); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 26 (2d Cir. 2003) (Newman, J. concurring) (proposed class of 12 million consumers); *Ewert v. Ebay, Inc.*, No. 07-CV-2198, 2010 WL 4269259, *3, *13 (N.D. Cal. Oct. 25, 2010) (certifying class of "over one million" sellers on website); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547-48 (2011) (proposed class of 1.5 million employees).

Cases of this nature, with potential plaintiffs residing across the country, are ripe for forum shopping. Plaintiffs in many of these cases may file in any jurisdiction they like—as illustrated by the seven cases that began this saga, in jurisdictions ranging from Washington to Florida. That being so, the need for uniform rules for litigating class-certification issues is manifest. Yet now that the Ninth Circuit has broken from other circuits and condoned the voluntary dismissal tactic, plaintiffs in class-action cases have wasted no time incorporating

the tactic into their procedural toolboxes for cases there.[5]

III. This Case Is A Particularly Suitable Vehicle For Resolving The Question Presented.

For two reasons, this case presents an excellent vehicle for resolving the propriety of the voluntary dismissal tactic.

1. This case puts into stark view the abuse that the voluntary dismissal tactic threatens. Years after *Livesay*, the Rules Committee gave the courts of appeals the authority, under Fed. R. Civ. P. 23(f), to hear interlocutory appeals of orders denying class certification. Courts of appeals have "unfettered discretion" to determine when to accept such interlocutory review. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005). But one of the factors the courts of appeals typically consider is "whe[ther], as a practical matter, the decision on certification is likely dispositive of the litigation." Fed. R. Civ. P. 23 advisory committee's note to 1998 Amendment. If the court of appeals believes it is looking at a genuine "death [] knell situation," it may allow the appeal for that reason alone. *Chamberlan*,

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[5] *See, e.g., Bobbitt v. Milberg LLP*, ___ F.3d ___, 2015 WL 5255081, *1-2 (Sept. 10, 2015) (applying this case to find jurisdiction over appeal after plaintiffs' "voluntary dismissal of their individual claims"); Appellant Henson's Reply Br. at 1, *Henson v. Fid. Nat'l Fin., Inc.*, No. 14-56578 (9th Cir.), *available at* 2015 WL 4537372 (invoking this case to support jurisdiction after voluntary dismissal); Reply Brief of Plaintiff-Appellant, *Smith v. Microsoft Corp.*, No. 14-55807 (9th Cir. Mar. 30, 2015), ECF 25 at 28-33.

402 F.3d at 957. But courts of appeals always remain free to reject plaintiffs' Rule 23(f) petitions for any reason.

As this case illustrates, the Ninth Circuit's acceptance of the voluntary dismissal tactic allows plaintiffs who try, and fail, to obtain discretionary review under Rule 23(f) to *force* courts to accept review anyway. Respondents sought interlocutory review under Rule 23(f), arguing "The District Court's Order Creates a Death-Knell Situation for Plaintiffs." Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 17. Their predecessors in the original Xbox suit did likewise. *See supra* at 3-4. The Ninth Circuit denied both petitions. Yet respondents countered by voluntarily dismissing their claims—thereby, under Ninth Circuit law, *requiring* the court of appeals to hear the very appeal it denied twice.

This makes a mockery of the discretion and balance Rule 23(f) confers. When that rule was promulgated, the Advisory Committee, drawing support from a Federal Judicial Center study, noted that "many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings." Fed. R. Civ. P. 23 advisory committee's note to 1998 amendment. For that reason and others, the courts of appeals deny plaintiffs' Rule 23(f) petitions about eighty percent of

the time.[6] Yet under the Ninth Circuit's voluntary dismissal rule, plaintiffs can require courts of appeals to hear *all* of these appeals. This cannot be right.

2. The jurisdictional issue is outcome-determinative here. Denials of class certification are reviewed for abuse of discretion. *See, e.g., Stearns v. Ticketmaster, Inc.*, 655 F.3d 1013, 1018 (9th Cir. 2011). Therefore, even when a court of appeals improperly assumes jurisdiction over an appeal challenging the denial of class certification, the court will often affirm, as the Ninth Circuit did in *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1070-71 (9th Cir. 2014). Such affirmances would be unlikely vehicles for addressing the propriety of the voluntary dismissal tactic, for a defendant in that situation would have no basis to seek review of a case in which it has prevailed, and plaintiffs would not seek review of a jurisdictional issue decided in their favor.

By contrast, both Microsoft and respondents have real interests in play here. The fact that the Ninth Circuit reversed the district court's denial of certification means that, if plaintiffs' voluntary dismissal gambit is allowed to stand, Microsoft faces years of continued litigation and uncertainty. Reversing the Ninth Circuit's decision, on the other hand, would require dismissal of respondents' appeal, thereby allowing the district court's final judgment for Microsoft to take effect.

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[6] John Beisner et al., *Study Reveals US Courts of Appeals Are Less Receptive to Reviewing Class Certification Rulings*, http://www.skadden.com/newsletters/OUTCOMES_TABLE.pdf.

IV. The Ninth Circuit's Decision Is Wrong.

The voluntary dismissal tactic that the Ninth and Second Circuits condone flies in the face of settled jurisdictional principles.

1. This Court held in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), that plaintiffs may not create appellate jurisdiction over orders denying class certification by maintaining that the orders sound the "death knells" of their lawsuits. It makes no difference whether the plaintiffs, in fact, "will not pursue their individual claim[s] if the decertification order stands." *Id.* at 466 n.7; *see also id.* at 470 (accepting that "refusal to certify a class" may sometimes "induce a plaintiff to abandon his individual claim"). Writing for a unanimous Court, Justice Stevens explained that the cost of avoiding mandatory appellate jurisdiction in this situation is "outweighed" by the impact such jurisdiction would have "on the judicial system's overall capacity to administer justice." *Id.* at 473. Accordingly, "the *only sure path* to appellate review" for plaintiffs refused class certification "is by proceeding to final judgment on the merits of [their] individual claim[s]," and, if they succeed, appealing the denial of class certification. Fed. R. Civ. P. 23 advisory committee's note to1998 Amendment (emphasis added).

The voluntary dismissal tactic cannot be squared with *Livesay*. The reason named plaintiffs voluntarily dismiss their individual cases after being denied class certification is to obtain immediate appellate review of orders they view as death knells. (Indeed, respondents explained here that they dismissed their claims because they viewed the district court's refusal to certify a class as the "death

knell" of their case. Pet. for Permission to Appeal Under Fed. R. Civ. P. 23(f) at 17. They wanted immediately "to appeal the [order] striking Plaintiff's class allegations." Pet. App. 36a.) And the Second and Ninth Circuits allow such appeals because the denials of class certifications "as a practical matter stop[] the plaintiff's action altogether." *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996) (explaining basis for the holding in *Gary Plastic*); *see also Gary Plastic*, 903 F.2d at 180 (noting that plaintiff "conceded that it does not intend to pursue its individual claims").

This reasoning simply resuscitates the death knell doctrine *Livesay* rejected. In fact, insofar as plaintiffs who voluntarily dismiss their claims may revive those claims on remand from reversal of an order denying class certification, the voluntary dismissal tactic functions *exactly the same* as the death knell doctrine did.

To be sure, plaintiffs under a voluntary dismissal regime must offer "a graphic demonstration"—by way of a formal motion to dismiss—"that the 'death knell' has indeed sounded." *Bowe*, 613 F.2d at 800. But that does not distinguish the voluntary dismissal tactic from the death knell doctrine. The very foundation of the death knell doctrine was a requirement that plaintiffs prove that "they would not pursue their claims individually." *Livesay*, 437 U.S. at 466. Confirming that reality in a separate filing is nothing more than meaningless formalism.

Lest there be any doubt that the voluntary dismissal tactic and the death knell doctrine are effectively one and the same, the voluntary dismissal tactic presents the same practical problems as well.

First, like the death knell doctrine, the voluntary dismissal tactic creates a "serious" "potential for multiple appeals in every complex case," *Livesay*, 437 U.S. at 474. *See supra* at 16-17. Second, like the death knell doctrine, the voluntary dismissal tactic "operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well," *Livesay*, 437 U.S. at 476. *See supra* at 14.

Third, and perhaps most significant, the voluntary dismissal tactic "circumvents" restrictions that federal law imposes upon "interlocutory review of decisions made by the trial judge," *id.* at 474-75. The death knell doctrine evaded the restrictions on interlocutory review embodied in 28 U.S.C. § 1292(b), which require parties seeking immediate appellate review to persuade the trial and appellate courts, in their discretion, to allow an appeal. *See Livesay*, 437 U.S. at 474-75. Rule 23(f) has now replaced Section 1292(b) with respect to class-certification orders, requiring plaintiffs to persuade only appellate courts (and not district courts) to allow interlocutory review of class-certification denials. But as this case vividly illustrates, the voluntary dismissal tactic circumvents this Rule in precisely the same way the death knell doctrine sidestepped Section 1292(b). It thus cannot be tolerated.

2. The only other conceivable argument a plaintiff might make to differentiate the voluntary dismissal tactic from the death knell doctrine would be to contend that voluntarily dismissing one's claims amounts to an irrevocable abandonment of the case, preventing the plaintiff's individual claims from

springing back to life even if a court of appeals reverses the denial of class certification. But any plaintiff who might make such an argument to evade *Livesay* would have yet another problem: Article III requires the named plaintiff in a class action to have a "personal stake" in the litigation. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990)) (additional internal quotation marks omitted in original). Thus, as the Fourth Circuit has explained, "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, . . . there is no longer a 'self-interested party advocating' for class treatment in a manner necessary to satisfy Article III requirements." *Rhodes*, 636 F.3d at 100 (quoting *Geraghty*, 445 U.S. at 403); *see also Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129-30 (1975) (per curiam) (case became moot when named plaintiffs seeking injunctive relief became ineligible for such relief before class certification).

In short, no matter how one approaches the voluntary dismissal tactic, it runs headlong into settled restrictions on appellate jurisdiction and the power of federal courts. This Court should grant review and repudiate the ploy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2015

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-35946

D.C. No. 2:11-cv-00722 RSM

SETH BAKER; MATTHEW DANZIG; JAMES JARRETT; NATHAN MARLOW; MARK RISK, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

MICROSOFT CORPORATION, a Washington Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted
April 7, 2014— Seattle, Washington

Filed March 18, 2015
Amended July 20, 2015

Before: Michael Daly Hawkins, Johnnie B. Rawlinson, and Carlos T. Bea, Circuit Judges.

Order;
Opinion by Judge Rawlinson;
Concurrence by Judge Bea

ORDER AND AMENDED OPINION

SUMMARY*

Class Certification

The panel reversed the district court's stipulated dismissal and order striking class allegations in a diversity action brought by a putative class of owners of Microsoft Corporation's Xbox 360 video game console.

The putative class alleged a design defect in the Xbox console that gouged game discs. In striking the class allegations, the district court concluded that comity required deferral to an earlier class certification denial from another district court decision involving a similar putative class.

The panel held that there was jurisdiction under 28 U.S.C. § 1291 to hear the appeal because the district court's dismissal of the action with prejudice was a sufficiently adverse, and appealable, final decision, even though the dismissal was the product of a stipulation. The panel also held that the decision in *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

1168, 1173 (9th Cir. 2010) (rejecting the notion that individual manifestations of a defect precluded resolution of the claims on a class-wide basis), was controlling, and the district court's decision striking the class action allegations from the complaint contravened *Wolin* and was an abuse of discretion. The panel remanded for further proceedings.

Judge Bea concurred in the result, but not the reasoning, of the majority opinion. Judge Bea would hold that under the principles of comity a federal district court faced with an earlier denial of class certification in an earlier common dispute heard in a different district court should adopt a rebuttable presumption of correctness; and Judge Bea would conclude that presumption was rebutted in this case.

COUNSEL

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Stephen M. Rummage (argued), Frederick B. Burnside, and John Goldmark, Davis Wright Tremaine LLP, Seattle, Washington, for Defendant-Appellee.

ORDER

The slip opinion dated March 18, 2015 is hereby amended as follows:

Page 11 - insert the following footnote at the end of the first paragraph:

> Our decision in *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), is not to the contrary. There, putative class plaintiff Huey's motion for class certification was denied in the district court. *Id.* at 1236. Subsequently, Huey's individual action was called for trial, but Huey made no appearance; accordingly, the district court dismissed Huey's action for want of prosecution. *Id.* Huey attempted to appeal the denial of class certification, but this court explained that it lacked jurisdiction over the appeal. We explained that the strong policy of giving trial judges the ability "to achieve the orderly and expeditious disposition of cases" meant that plaintiffs who had failed to prosecute their claims lost the ability to appeal the denial of class certification. *Id.* at 1239 (quoting *Sullivan v. Pacific Indem. Co.*, 566 F.2d 444, 445–46 (3rd Cir. 1977)).
>
> However, *Huey* does not control here. Unlike that proceeding, Baker did not fail to appear before the district court after the class action allegations were struck. In fact, Baker stipulated to dismiss his individual claim, giving up a valuable right in the process. Our cases recognize that a stipulated dismissal of an individual claim is an adverse and appealable final judgment, *Berger*, 741 F.3d

at 1065, as does a leading treatise. *See* 7B Charles Allan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 1802 (3d ed. 2005).

With this amendment, Judges Rawlinson and Bea voted, and Judge Hawkins recommended, to deny the Petition for En Banc Rehearing.

The full court has been advised of the Petition for En Banc Rehearing, and no judge of the court has requested a vote.

Microsoft Corporation's Petition for En Banc Rehearing, filed on April 1, 2015, is DENIED. No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

RAWLINSON, Circuit Judge:

Plaintiffs, a putative class of owners of Microsoft Corporation's (Microsoft) Xbox 360® video game console (Xbox), appeal from the stipulated dismissal with prejudice of their lawsuit and from the order striking their class allegations. In striking the class allegations, the district court deferred to an earlier class certification denial order involving a similar putative class. *See Baker v. Microsoft Corp.*, 851 F. Supp.2d 1274, 1276 (W.D. Wash. 2012) (citing *In re Microsoft Xbox 360 Scratched Disc Litig.*, No. C07-1121, 2009 WL 10219350 (W.D. Wash. Oct. 5, 2009) (*Scratched Disc Litigation*)). We have jurisdiction pursuant to 28 U.S.C. § 1291 and reverse the order striking the class action allegations because the district court misapplied the law as established in *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d

1168, 1173 (9th Cir. 2010), constituting an abuse of discretion.

I. BACKGROUND

This case involves an alleged design defect in the Xbox console that gouges game discs. *See Baker*, 851 F. Supp.2d at 1275. Plaintiffs specifically alleged that the Xbox optical disc drive is unable to withstand even the smallest of vibrations, and that during normal game playing conditions discs spin out of control and crash into internal console components, resulting in scratched discs that are rendered permanently unplayable. Microsoft countered that the overwhelming majority of Xboxes do not manifest the alleged defect—only 0.4% of Xbox owners have reported disc scratching—and that the cause of any disc scratching is consumer misuse, not a product defect.

A. SCRATCHED DISC LITIGATION

In 2007, other Xbox owners sued Microsoft, alleging claims similar to those asserted in this case. These cases were consolidated before United States District Judge John Coughenour. *See Scratched Disc Litig.*, 2009 WL 10219350, at *1–*2. Judge Coughenour denied class certification on the basis that individual issues of fact and law predominated over common issues of fact and law. *See id.* at *5–*6.

Judge Coughenour relied heavily on the reasoning from another district court decision, *Gable v. LandRover N. Am., Inc.*, No. CV07-0376, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008), *rev'd, Wolin*, 617 F.3d at 1176. *See Scratched Disc Litig.*, 2009 WL 10219350, at *6. The putative class action plaintiffs in *Gable* alleged that the Land Rover LR3 had a defect in

its alignment that caused uneven, premature tire wear. *See Gable*, 2008 WL 4441960, at *1.[1] In opposing class certification, defendant Land Rover argued that because the alleged defect did not manifest in every vehicle, an individual inquiry would be required to ascertain whether any given class member experienced the defect. *See id.* at *3. Land Rover also asserted that because tires have a limited useful life, an individual inquiry would be required to determine whether any given tire wear resulted from a defect and not another cause, such as individual driving habits. *See id.* The district court agreed with Land Rover, and denied class certification because the plaintiffs failed to demonstrate that the purported defect manifested in a majority of vehicles. *See id.* at *4–*5. The district court did not address Land Rover's causation argument.

In *Scratched Disc Litigation*, Judge Coughenour reasoned that, like the Land Rover owners in *Gable*, most Xbox owners have not experienced the purported defect. *See Scratched Disc Litig.*, 2009 WL 10219350, at *7. Judge Coughenour focused on the fact that the defect asserted by the Xbox plaintiffs "actually manifest[ed] in fewer than one percent" of the total number of consoles purchased. *Id.* at *6. The vast number of satisfied purchasers who experienced no defect before replacing the rapidly obsolescing game systems were determined to have received the benefit of the bargain. *See id.* Because not all purchasers sustained damages under this rationale, Judge Coughenour ruled that the need to consider damages

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[1] In particular, the plaintiffs contended that the front of each of the vehicle's rear tires was farther out from the center line than the back of each tire, a condition the district court described as "duck-footed." *Gable*, 2008 WL 4441960, at *1.

on an individual basis "preclude[d] the certification" of the class of Xbox owners. *Id.*

Judge Coughenour rejected the Xbox plaintiffs' attempt to distinguish *Gable* on the basis that the design defect existed in every Xbox console and could only stem from one cause, whereas in *Gable* "only a fraction of the proposed class members had actually experienced the defect and because misalignment could have many different causes." *Id.* Judge Coughenour observed that the Xbox plaintiffs and the Gable plaintiffs both asserted a defect involving a common design flaw. The circumstance that prevented class certification in both cases was the lack of uniform manifestation of the acknowledged design flaw. *See id.*

Although the district court in *Gable* refrained from engaging in an exhaustive causation analysis, Judge Coughenour nevertheless cited *Gable* for the notion that individual issues of causation predominate because differing causes may have produced the same defect. *See id.* According to Judge Coughenour, "[E]ven if one link of [the causation] chain is a design defect, the other links are unique to each plaintiff and require individual attention. . . ." *Id.* The required individual attention to issues of law and fact ruled out class certification. *See id.*

B. WOLIN DECISION

Ten months after dismissal of *Scratched Disc Litigation*, we reversed the Gable decision upon which Judge Coughenour had so heavily relied in denying class certification. *See Wolin*, 617 F.3d at 1170, 1176. We concluded that the district court in *Gable* "erred when it concluded, without discussion, that certification is inappropriate because [plaintiffs] did not prove that the defect manifested in a majority of the class's

vehicles. . . ." *Id.* at 1173. Indeed, in the past, "we have held that proof of the manifestation of a defect is not a prerequisite to class certification." *Id.* (citing *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975)). We observed that rather than challenging the predominance of common legal and factual issues, Land Rover was actually arguing the merits of the case. *See id.* We concluded that while "individual factors may affect premature tire wear, they do not affect whether the vehicles were sold with an alignment defect." *Id.*

> [W]e reject[ed] Land Rover's suggestion that automobile defect cases can categorically never be certified as a class. Gable and Wolin assert[ed] that the defect exists in the alignment geometry, not in the tires, that Land Rover failed to reveal material facts in violation of consumer protection laws, and that Land Rover was unjustly enriched when it sold a defective vehicle. All of these allegations are susceptible to proof by generalized evidence.

Id.

Land Rover also asserted that the claims of plaintiffs Gable and Wolin were not typical because the wear on their tires was not attributable to misalignment. *See id.* at 1175. We were not persuaded to this view because Land Rover failed to identify any defenses that were unique to Gable and Wolin. *See id.* We decided that regardless of when the premature tire wear was experienced, the fact remained that all class members at some point experienced the same injury due to the same defect. The timing of the defect affected the amount of damages, not the appropriateness of class certification. *See id.* In sum, we held that the requirement of typicality "can be satisfied despite

different factual circumstances surrounding the manifestation of the defect." *Id.* (citation omitted). We concluded that Gable, Wolin, and the other class members could have a viable claim against Land Rover regardless of how the defect manifested in the individual vehicles. See id. We ruled that the asserted alignment defect, the asserted violation of warranty, and the asserted unjust enrichment due to the lessened value of the vehicles were "issues common to all class members . . ." *Id.* at 1176.

The district court in this case determined that our ruling in *Wolin* did not undermine the causation analysis articulated in *Scratched Disc Litigation*, and that comity required deferral to the earlier certification order. *See Baker*, 851 F. Supp.2d at 1279–81 (striking the class action allegations from the complaint). The district court noted that no Ninth Circuit or Supreme Court precedent articulated the mechanism by which comity was to operate; thus it adopted the suggestion of the American Law Institute (ALI) that a prior denial of class certification on the same subject matter by a different district court judge be given a rebuttable presumption of correctness. *See id.* at 1278. The district court then determined that the presumption had not been rebutted, and deferred to Judge Coughenour's prior decision. *See id.* at 1280.

Plaintiffs initially petitioned for an interlocutory appeal, which was denied. The parties subsequently stipulated to dismiss the case with prejudice, and the district court approved the stipulation. Plaintiffs timely appealed.[2]

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[2] Courts have grappled with the balance between preventing repeated frivolous efforts to certify a class and preserving due process rights. *See, e.g., In re Bridgestone/Firestone, Inc., Tires*

II. DISCUSSION

A. JURISDICTION

Microsoft contends that we lack jurisdiction to consider this appeal because the voluntary dismissal with prejudice did not create appellate jurisdiction. Because jurisdiction is a threshold issue, we resolve this matter before addressing the merits. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

Microsoft takes the position that a voluntary dismissal with prejudice does not sufficiently affect the merits of the substantive claims to constitute an appealable final judgment.[3] However, we rejected a similar argument in *Berger*, where as in this case, the parties stipulated to dismissal of the case with prejudice following denial of a class certification motion. 741 F.3d at 1064. Like Microsoft, the defendant in Berger challenged our jurisdiction over an appeal resulting from stipulated dismissal of a

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Products Liab. Litig., 333 F.3d 763, 768–69 (7th Cir. 2003) (binding putative class members whether or not named). Despite the Supreme Court's recognition of "policy concerns relating to use of the class action device," the Court rejected the Seventh Circuit's approach and decided that "principles of *stare decisis* and comity among courts" would have to "mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2381 (2011). The district court's application of the ALI proposal may be viewed as an effort to reconcile these values and follow the Supreme Court's guidance in *Smith*.

[3] Microsoft also contends that because the Plaintiffs unsuccessfully moved for interlocutory appeal under Rule 23(f), they must litigate the merits of their claims to final judgment to obtain appellate review. However, Microsoft has not presented a principled basis for this proposed distinction between the present case and *Berger*.

putative class action. *See id.* at 1065. We disagreed, ruling that "in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal. . . ." *Id.* at 1064. We distinguished a stipulated dismissal without a settlement from a stipulated dismissal with a settlement. The former retains sufficient adversity to sustain an appeal. The latter does not. *See id.* at 1065.

As this case did not involve a settlement, *Berger* establishes that "[w]e have jurisdiction under 28 U.S.C. § 1291 because a dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse—and thus appealable—final decision." *Id.*[4]

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[4] Our decision in *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), is not to the contrary. There, putative class plaintiff Huey's motion for class certification was denied in the district court. *Id.* at 1236. Subsequently, Huey's individual action was called for trial, but Huey made no appearance; accordingly, the district court dismissed Huey's action for want of prosecution. *Id.* Huey attempted to appeal the denial of class certification, but this court explained that it lacked jurisdiction over the appeal. We explained that the strong policy of giving trial judges the ability "to achieve the orderly and expeditious disposition of cases" meant that plaintiffs who had failed to prosecute their claims lost the ability to appeal the denial of class certification. *Id.* at 1239 (quoting *Sullivan v. Pacific Indent. Co.*, 566 F.2d 444, 445–46 (3rd Cir. 1977)).

However, *Huey* does not control here. Unlike that proceeding, Baker did not fail to appear before the district court after the class action allegations were struck. In fact, Baker stipulated to dismiss his individual claim, giving up a valuable right in the process. Our cases recognize that a stipulated dismissal of an individual claim is an adverse and appealable final judgment, *Berger*, 741 F.3d at 1065, as does a leading treatise. *See* 7B

B. STRIKING OF CLASS ACTION ALLEGATIONS FROM THE COMPLAINT

Judge Martinez struck the Xbox Plaintiffs' class action allegations from the complaint based largely on Judge Coughenour's finding in *Scratched Disc Litigation* that individual issues of causation predominated in that earlier Xbox defect case. *See Baker*, 851 F. Supp.2d at 1276–77. Judge Martinez determined that, although *Wolin* reversed the holding in Gable that Judge Coughenour relied on, *Wolin* did not undermine the causation analysis set forth in Scratched Disc Litigation. *See id.* at 1279–80. We do not agree.

Judge Martinez cited Judge Coughenour's description of the causation analysis in *Gable* for the notion that individual issues of causation predominated in this case. He observed that Judge Coughenour found persuasive the analysis in *Gable* discussing alternative causes of tire defect manifestation, and that Judge Coughenour followed that reasoning in determining that individual issues of causation predominated in *Scratched Disc Litigation*. *See id.* at 1279.

Judge Martinez's order applied this same causation analysis to reach his conclusion that "[t]he discs at issue in this case are analogous to the tires at issue in *Gable/Wolin* because, as Judge Coughenour recognized, both products may be damaged for any number of reasons . . ." *Id.* This discussion reveals that Judge Martinez relied heavily on *Gable* for its causation analysis.

Charles Allan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure § 1802 (3d ed. 2005).

Judge Martinez determined that "nothing in *Wolin* undermines Judge Coughenour's causation analysis . . ." *Id.* at 1280. However, our reading of *Wolin* leads to a different conclusion. In *Wolin*, we expressly and specifically rejected the notion that individual manifestations of the defect precluded resolution of the claims on a class-wide basis. We held that "[a]lthough individual factors may affect premature tire wear, they do not affect whether the vehicles were sold with an alignment defect." 617 F.3d at 1173. We were not persuaded by Land Rover's efforts to distinguish the representative plaintiffs' claims from those of other prospective class members. We noted that all prospective class members alleged the same injury from a defective alignment in their vehicles. All prospective class members sought recovery pursuant to the same legal theories, and Land Rover failed to identify any defenses that were unique to the representative plaintiffs. *See id.* at 1175. In *Wolin*, we clarified that the individual manifestations of the defect were relevant "to the extent of [plaintiffs'] damages and not whether [Gable and Wolin] possess the same interest and suffered the same injury as the class members. . . ." *Id.* (citation, alteration, and internal quotation marks omitted). We concluded in *Wolin*:

> Whether the alignment geometry was defective, whether Land Rover violated its Limited Warranty for defects within the vehicle, and whether Land Rover was unjustly enriched because consumers' vehicles are worth less due to the defect are issues common to all class members and can be litigated together. . . .

Id. at 1176.

Similarly in this case, although individual factors may affect the timing and extent of the disc scratching, they do not affect whether the Xboxes were sold with a defective disc system. Plaintiffs contend that (1) whether the Xbox is defectively designed and (2) whether such design defect breaches an express or an implied warranty are both issues capable of common proof. We agree that, as in *Wolin*, these issues are susceptible to proof by generalized evidence and do not require proof of individual causation. *See id.* at 1172–74, 1176.

Among the common questions identified under the warranty claims are:

> i. The existence of any express warranties made by Microsoft concerning the Xbox 360;
>
> ii. The application of any such express warranties to the claims asserted in this action;
>
> iii. Whether Microsoft has breached any of its express warranties, as alleged herein;
>
> iv. The existence of any implied warranties made by Microsoft concerning the Xbox 360;
>
> v. The application of any such implied warranties to the claims asserted in this action;
>
> vi. Whether Microsoft has breached any of its implied warranties, as alleged herein; . . .

Microsoft contends that plaintiffs' express warranty claim is not amenable to class treatment because individual proof of causation is necessary to determine if there was a breach of its express warranty.

According to Microsoft, like the Tire Warranty at issue in *Wolin*, a determination of whether the allegedly defective Xbox disc system caused a given disc to scratch requires proof specific to that class member. However, this analogy is inapt because plaintiffs' position is that the design defect itself breaches the express warranty.

The most that can be said of the holding in *Wolin* that would be of assistance to Microsoft is our recognition that "early tire wear cases *may* be particularly problematic for plaintiffs seeking class certification . . ." *Id.* at 1173 (emphasis added). Nevertheless, in that case, we "reject[ed] Land Rover's suggestion that automobile defect cases can categorically never be certified as a class." *Id.* In *Wolin*, plaintiffs alleged the existence of a design defect, Land Rover's failure to reveal material facts and Land Rover's unjust enrichment due to the sale of defective vehicles. *See id.* We held that these allegations were "susceptible to proof by generalized evidence. Although individual factors may affect premature tire wear, they [did] not affect whether the vehicles were sold with an alignment defect." *Id.*

Similarly, proof that the allegedly defective disc system caused individual damages is not necessary to determine whether the existence of the alleged design defect breaches Microsoft's express warranty. Rather, plaintiffs' breach of express warranty claim presents a common factual question—is there a defect?—and a common mixed question of law and fact—does that defect breach the express warranty? We conclude, as we did in *Wolin*, that the district court erred in finding that individual issues of causation predominate over these common questions. *See id.*

Microsoft attempts to further distinguish *Wolin* by arguing that, unlike the vehicles in *Wolin*, with their "duck-footed" tires that inevitably caused uneven, premature tire wear, the defect here may never manifest. Microsoft contends that it proved in the *Scratched Disc Litigation* that the alleged defect does not manifest in the vast majority of Xboxes. However, we debunked this argument in *Wolin* by referencing the rule from *Blackie*, 524 F.2d at 901, that "proof of the manifestation of a defect is not a prerequisite to class certification. . . ." *Id.*

What Microsoft is really arguing is that plaintiffs cannot prevail on the merits. *See id.* However, Microsoft's merits-based contention has no place in the determination of whether an action may proceed on a class-wide basis. When the district court relied on *Gable* to conduct this merits-based analysis, *see Baker*, 851 F. Supp.2d at 1279–80, it erred, thereby abusing its discretion.

Microsoft next argues that, "unlike the *Wolin* plaintiffs— who alleged the alignment defect made their luxury vehicles 'worth less,' . . . —Plaintiffs neither claimed the alleged defect made Xbox 360 consoles worth less nor offered common evidence of damage or loss to the proposed class." This argument misconstrues the allegations of the complaint. Like the plaintiffs in *Wolin*, plaintiffs in this case alleged that a design defect diminished the value of the Xbox.

In a footnote, Microsoft also suggests that individual issues of state warranty law predominate for implied warranty claims. However, Microsoft has not identified any material differences in the applicable state implied warranty laws that would require an individualized inquiry regarding the commonly asserted defect. Indeed, Microsoft noted in its appellate brief

the similarity among the implied warranty statutes in Washington, California, Illinois, New York and Michigan.

Finally, Microsoft seeks to characterize plaintiffs' class action allegations as proceeding on the theory that *Wolin* created a *per se* rule requiring class certification of defect claims. Microsoft's contention is premature and misses the mark. As an initial matter, in *Wolin* we did not adopt a *per se* rule requiring class certification of defect claims. Indeed, the converse is true. Rather than adopting a *per se* rule, we simply rejected Land Rover's suggestion that we should categorically decline to certify classes in automobile defect cases. *See Wolin*, 617 F.3d at 1173. Moreover, plaintiffs in this case never moved for class certification. Instead, the district court erroneously ruled that defect allegations are not amenable to resolution on a class-wide basis and struck the class allegations from the complaint. *See Baker*, 851 F. Supp.2d at 1280–81. Microsoft makes several arguments to this court attempting to distinguish *Wolin* and to show that certification of this class would violate Federal Rule of Civil Procedure 23. However, our ruling that the district court's application of comity was misplaced means that these arguments are better addressed if and when plaintiffs move for class certification. It suffices for now to hold that because the district court misread *Wolin*, it did not account for the change in applicable law that made deference to Judge Coughenour's opinion erroneous.[5]

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[5] Although no circuit has adopted the ALI rule since its publication in 2010 (nor did the Supreme Court endorse it in *Smith*), the district court misapplied the rule by relying on the wrong legal standard. The district court gave a presumption of correctness to Judge Coughenour's prior ruling, but improperly

We express no opinion on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification if such a motion is filed. We hold only that the district court committed an error of law and abused its discretion when it struck the class action allegations from the complaint in contravention of applicable Ninth Circuit precedent.

III. CONCLUSION

We conclude that we have jurisdiction over this appeal despite the parties' stipulation to dismiss the case following the district court's ruling striking the class action allegations. We hold that our decision in *Wolin* is controlling, and the district court's decision striking the class action allegations from the complaint contravened *Wolin* and was an abuse of discretion.

REVERSED and REMANDED for further proceedings consistent with this opinion.

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determined that a change in law (our decision in *Wolin*) did not rebut the presumption. In other words, assuming *arguendo* the validity of the ALI rule, the district court's misreading of the prior ruling rendered application of the presumption of comity an abuse of discretion. *See United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc) (abuse of discretion to identify wrong legal standard); *see also Barapind v. Reno*, 225 F.3d 1100, 1109 (9th Cir. 2000) (decision to dismiss under comity doctrine reviewed for abuse of discretion). Given that we can decide this case on a narrower and more well established ground, there is no reason to adopt the ALI rule here.

BEA, Circuit Judge, concurring in the result:

This case presents an important question of first impression in the federal courts of appeal: What principles should guide a federal district court's application of comity to a fellow district court's earlier denial of class certification, when addressing a later motion for class certification by a similar class of plaintiffs? The parties asked this question of Judge Martinez in the district court, who answered ("[i]n the absence of any specific guidance" from our court) by adopting the American Legal Institute's ("ALI") suggestion that the earlier denial of class certification be accorded a rebuttable presumption of correctness. *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1278 (W.D. Wash. 2012). We should be aware that litigants in other cases have added to the chorus of voices requesting guidance, reinforcing just how important this question is to effective adjudication of class action litigation. *See, e.g., Ott v. Mortgage Investors Corp. of Ohio*, 2014 WL 6851964 at *13 (D. Or. Dec. 3, 2014) (citing *Baker*, 851 F. Supp. 2d at 1278).

I believe our court owes it to district courts to give them the guidance which Judge Martinez found, quite correctly, was absent. Moreover, I respectfully disagree with the majority opinion's assertion that this case can be decided on the "narrower and more well established ground" that Judge Martinez erred in basing his ruling on the tire defect cases. Maj. Op. at 19 n. 5 (citing *Gable v. Land Rover North America, Inc.*, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008), rev'd sub nom *Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168 (9th Cir. 2010)). That simply was not the basis for Judge Martinez's ruling. Rather, Judge Martinez based his ruling on the only ground urged by Microsoft: that he should defer, for reasons of comity,

to Judge Coughenour's denial of class certification in an earlier, similar class action.[1] For that reason, I do not concur in the majority opinion. Instead, I would hold that a federal district court faced with an earlier denial of class certification in an earlier common dispute heard in a different district court should adopt the rebuttable presumption of correctness suggested by the ALI and adopted by Judge Martinez. But because I conclude that presumption was rebutted in this case, I concur in the result reached by the majority.

I. Background

First, a brief history of this action may be helpful to bring focus. In *Gable*,[2] the district court denied certification of a class of Land Rover owners who alleged a defect in the wheel alignment of their vehicles that caused uneven, premature tire wear. The district court judge believed that the individual issue whether or not the defect actually had manifested itself by causing damage to the tire predominated over the common issue whether the car had defective wheel alignment. *Gable v. Land Rover North America, Inc.*, 2008 WL 4441960, *5 (C.D. Cal. Sept. 29, 2008).

A year later, District Judge Coughenour in *In re Microsoft Xbox 360 Scratched Disc Litigation*, 2009 WL 10219350 (W.D. Wash. Oct. 5, 2009), was presented with a putative class of X-Box owners who, similar to plaintiffs here, alleged their X-Box devices had scratched their video game discs. He relied on the

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[1] *See infra* footnote 5 and accompanying text.

[2] *Gable v. Land Rover North America, Inc.*, 2008 WL 4441960 (C.D. Cal. Sept. 29, 2008), *rev'd sub nom Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168 (9th Cir. 2010).

causation analysis of *Gable* to deny certification of the class. He reasoned that much as each Land Rover owner in *Gable* had to show that the alignment defect had manifested itself by causing tire damage in his car, so too each video game system owner in *Microsoft Xbox 360 Scratched Disc Litigation* had to show that the scratching defect of his game console had manifested itself by damaging a disc. The manifested effect of the product defect would tend to be different as to each plaintiff's tire or disc. Notably, Judge Coughenour ruled against the plaintiffs' attempts to distinguish Gable, saying that the two cases presented identical questions of predominance of individual issues over common class issues. *Microsoft Scratched Disc Litigation* at *7. That scratched disc case was settled later that year.

In 2010, the Ninth Circuit reversed *Gable's* determination of the predominance question. We held the common question whether a defect existed in the wheel alignment predominated over the individual question of the manifestation of the defective wheel alignment through uneven tire wear.[3] Judge Martinez, the district court judge here, heard Microsoft's motion to strike class claims in 2012, and was faced with an unusual conundrum.

The Supreme Court had recently held that federal district courts are expected "to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Smith v. Bayer*, 131 S.Ct. 2368, 2382 (2011). But no Ninth Circuit or

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[3] The Ninth Circuit reversed under a different name. *Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168 (9th Cir. 2010). Thus, *Wolin* refers unambiguously to the Ninth Circuit ruling, while *Gable* refers unambiguously to the district court ruling.

Supreme Court precedent existed to interpret how principles of comity should be applied. Judge Martinez thus adopted the suggestion of the American Legal Institute ("ALI") that an earlier class certification decision of a different district court should be afforded a rebuttable presumption of preclusive effect. Applying this presumption, he held that the presumption of preclusive effect as to Judge Coughenour's ruling in *Microsoft Xbox 360 Scratched Disc Litigation* had not been rebutted, and granted the motion to strike. Judge Martinez did not opine on the issues raised by the motion to strike de novo, and the defendants did not base their motion to strike on any grounds beyond comity.[4]

Was Judge Martinez's application of comity correct? As I have noted, this is a question of first impression in this circuit, and a difficult one. And it puts the wrong question in this case to assert, as the majority does, that Judge Martinez misconstrued this court's opinion in *Wolin*.[5] After all, in the typical comity case,

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[4] *See* ER 45 (making the comity argument as to the motion to strike, then arguing that "In the Alternative, the Court Should Deny Certification of Plaintiffs' Proposed Classes."). Certification raises issues and procedures quite different from a motion to strike, and defendants were unambiguous in relying on the comity argument alone for their motion to strike. Plaintiffs replied that "comity does not apply" because *Wolin* was an intervening change in law; as the ALI explains, the comity presumption of correctness is rebutted "when the basis for an earlier denial. . . is no longer present." Dkt. 23 at 17 (citing Am. Law. Inst., *Principles of the Law of Aggregate Litigation* § 2.11 cmt. c. (2010)).

[5] I agree that Judge Martinez misunderstood *Wolin*. *See* Part III, infra. He did not see *Wolin* as a change in the law, despite Judge Coughenour's reliance on the decision *Wolin* overruled. But I do not agree that Judge Martinez relied on *Wolin*, since nothing in his order suggests such reliance. To the contrary, the

where a US court is considering whether to give effect to a foreign judgment, "the mere assertion of [a] party that the [earlier] judgment was erroneous in law or in fact" does not suffice to disrupt the presumption that the foreign judgment be given legal effect. *Asvesta v. Petroutsas*, 580 F.3d 1000, 1011 (9th Cir. (2009)) (quoting *Hilton v. Guyot*, 159 U.S. 113 (1895)). In those cases, a "special reason why the comity of this nation" should not attach is needed. *Id.* Perhaps such solicitousness makes less sense in the federal district court context; since federal district court judges are not sovereigns, their decisions might not require a "special reason" to be ignored. But if that is the conclusion we come to, we should say so.

There is no governing precedent from the Supreme Court or from our court discussing application of principles of comity to orders of denials of class certification entered by district courts in cases involving similar class claims. But the notion of comity between federal district courts under federal common law is not new to our circuit.

Indeed, as Judge Martinez noted, comity between federal district courts in this circuit has long encompassed decisions by the courts designed to promote the smooth workings of the federal judiciary and to avoid the embarrassment of inconsistent results. *Baker*, 851 F.Supp.2d at 1278. For instance, in *Church of Scientology of California v. U.S. Dept. of*

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order suggests he relied on Judge Coughenour's earlier ruling. Moreover, there is no authority the majority can cite for the proposition that if Judge Martinez had understood *Wolin* as a change in the law, he was obliged to refuse comity deference to Judge Coughenour's earlier ruling. Indeed, that is the very question the majority should have answered in this case, and with which this concurrence deals.

Army, 611 F.2d 738 (9th Cir. 1979), the Church of Scientology filed a request pursuant to the Freedom of Information Act for any government materials involving itself or its founder, L. Ron Hubbard. The relevant agency (the Department of the Army) refused to release a certain document. Litigation involving this document proceeded in the federal district courts of the Central District of California and of the District of Columbia. The California district court declined to compel the release of the document on the grounds that the D.C. court was considering the same issue, and the issue was better litigated in D.C. On appeal, the Ninth Circuit held that since the district court in D.C. had already issued its decision, which had been reversed by the D.C. Circuit and remanded for future proceedings, the interests of comity were best served by deferring to the D.C. case, where proceedings were further advanced.[6]

Since the recognition and application of comity to courts' earlier decisions is a matter of federal common law, and no Supreme Court precedent guides our inquiry, this court has discretion to craft the rules of federal district court comity it thinks should apply. Since Judge Martinez's decision cannot be affirmed or

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[6] The more common federal comity case occurs when a federal district court declines jurisdiction over a case on the grounds that an action relating to the same subject matter has already been commenced in another district. The first-to-file rule is technically an abdication by the district court; if subject matter jurisdiction exists, the second court is not required by any constitutional principle to desist. It does so for the unremarkable reason that the public interest—conservation of judicial resources and minimization of the risk of inconsistent decisions—is better served by so doing.

reversed, in my view, without explaining whether his vision of comity was correct, I turn to that question.

II. A Framework for Comity

I suggest the following framework for district courts faced with earlier class certification denials for the same or similar plaintiff classes. First, a district court that is faced with the earlier ruling of another district court denying class certification for a similar putative class should adopt as a rebuttable presumption that the litigation is not amenable to class action treatment.[7] Second, that presumption may be rebutted by proof from the putative class representative that shows a change in factual or legal circumstances since the entry of the earlier order which change rebuts the presumption. Alternatively, the presumption may be rebutted by a showing that the earlier district court ruling was based on clear error. Finally, this court should review a district court's decision on whether the rebuttable presumption attaches or has been rebutted for abuse of discretion. How does this approach play out; and, will it work?

A. An Earlier Denial of Certification of a Similar Class Should Give Rise to a Rebuttable Presumption That the Litigation is Not Amenable To Class Treatment

The basic posture of this case is not new: a defendant faces a putative class of plaintiffs, but there is substantial uncertainty as to whether the putative class will be able to satisfy Federal Rule of Procedure 23's requirements for class treatment. As the Supreme

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[7] Thus, I would have the district court presented with a motion to strike class allegations, as in this case, give comity deference to an earlier ruling on class certification as to similar class claims.

Court has recognized, the decision whether or not the class is certified is usually the most important ruling in such a case; once a class is certified, plaintiffs who brought claims of even dubious validity can extract an "in terrorem" settlement from innocent defendants who fear the massive losses they face upon an adverse jury verdict. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

Thus, plaintiff's counsel need not present meritorious claims to achieve victory; they need obtain only a favorable class certification ruling. In light of the minimal costs of filing a class complaint, an obvious strategy suggests itself: keep filing the class action complaint with different named plaintiffs[8] until some judge, somewhere, grants the motion to certify. So long as such a decision is reached while the plaintiffs who have not yet filed are numerous enough to justify class treatment, the plaintiffs will have a certified class that they can use to extract an in terrorem settlement.

If in terrorem settlements are bad, duplicative lawsuits employed to extract such a settlement are worse. It is no surprise, then, that appellate courts have long been trying to solve this problem. One solution was put forth by the Seventh Circuit in *In re Bridgestone/Firestone, Inc. Tires Product Liability Litigation*, 333 F.3d 763 (7th Cir. 2003). There, the Seventh Circuit held that an earlier denial of class certification would be binding on all putative members

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[8] Different named plaintiffs would be required because the original named plaintiff, as party to the suit, would be precluded from relitigating the matter. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (describing basic principles of claim and issue preclusion).

of the class, whether or not named in the action, so long as they were adequately represented by the named litigants and class counsel. Thus, there would be an irrebuttable presumption that an earlier denial of class certification had binding effect.

However, the Supreme Court abrogated *Bridgestone/Firestone in Smith v. Bayer*. *Bayer*, 131 S.Ct. at 2380–81. There, the Court made clear that despite "policy concerns relating to use of the class action device," individuals not present before the district court could not be bound by its judgment, as the court simply lacked authority to bind them because they were not parties to the litigation, nor did they fit into any of the narrow exceptions to the party preclusion rule announced in *Taylor v. Sturgell*, 553 U.S. 880 (2008). This was not, the Supreme Court said, to deny the force of defense counsel's policy objection, but to state that "principles of stare decisis and comity among courts" would have to "mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Bayer*, 131 S.Ct. at 2380–81.

Thus, two principles guide application of comity in this context. First, a district court cannot treat an earlier denial of certification of class status to a similar plaintiff class as conclusive proof that the subject matter is not amenable to class treatment. *Bayer*, 131 S.Ct. at 2380–81. Second, district courts should adopt an approach to comity which resolves (or at least reduces) the policy concern of repeated certification efforts by plaintiffs seeking an in terrorem settlement. *AT&T Mobility LLC*, 131 S.Ct. at 1752 (2011). Taken together, these principles recommend that district courts be given a way to clear their dockets of questionable successive class certification requests, while ensuring that putative class members who have

unearthed new evidence or new law in favor of certification, or clear error in the earlier ruling, not be foreclosed by the failed efforts of their predecessors.

In light of the need to distinguish between legitimate and illegitimate successive class certification request, a presumption of correctness to earlier denials of certification that can be rebutted by a showing of changed factual or legal circumstances, or earlier clear error, makes sense. First, the district court is justified as a matter of procedure in assuming that the earlier denial of certification was correct; if it was not, plaintiffs in the earlier action could have pursued an interlocutory appeal[9] and had the decision vacated; the inference of correctness from its continued existence is reasonable.[10] Second, if the presumption of correctness is rebuttable, this rule does not run afoul of the Supreme Court's teaching in *Smith v. Bayer* that unnamed members of a putative class cannot be bound by the denial of certification. Plaintiffs are given an opportunity to challenge that earlier denial of class certification by rebutting the presumption, and the presumption will be rebutted in any case where there are good grounds to reconsider the initial determination that the subject matter of the case is not amenable to aggregate treatment. Third,

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[9] An interlocutory appeal of this order is explicitly allowed under Federal Rule of Civil Procedure 23(f), which allows circuit courts to permit an immediate appeal from the denial of class certification "if a petition for permission to appeal is filed with the circuit clerk within 14 days" of the denial.

[10] Or, as in this case, plaintiffs could voluntarily dismiss their claims with prejudice and appeal as of right. I concur with the opinion's jurisdictional and standing analysis based on Berger, so it is common ground that plaintiffs have created proper appellate jurisdiction in this manner.

the policy concern about the cost of defending against successive certification motions is reduced by putting the onus on plaintiffs to explain why the earlier ruling should not be given effect: so long as there is no new evidence, change in the law, or clear error in the earlier dismissal, defendants can rely on their first victory to stave off in terrorem settlements.[11] Fourth, as the district court noted in this case, adoption of a rebuttable presumption has scholarly support. *See Baker v. Microsoft Corp.*, 851 F.Supp.2d 1274, 1278 (W.D. Wash. 2012) (citing ALI Principles of the Law of Aggregate Litigation).[12]

In particular, when there has been a change in the law governing whether a matter is amenable to class treatment—as there was in the Range Rover wheel alignment case—that should be grounds for rebutting the presumption in favor of the earlier ruling which was based on abrogated law and which denied class certification. This is because there are pro-class action policy arguments that we should not ignore. In particular, class actions are an important way of resolving so-called "negative value claims"; that is,

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[11] My suggestion balances the finality value of a definitive ruling in defendants' favor with the danger of an erroneous first denial of class certification curtailing legitimate claims by allowing the second district court to engage in clear-error review of the first court's ruling.

[12] Plaintiffs in this case allege that a rebuttable presumption serves to unduly constrain district court discretion. But discretion does not mean *unbounded* discretion, and the policy arguments against duplicative class actions recognized by the Supreme Court in *Smith v. Bayer* require some restrictions on the discretion of district courts to certify a class. 131 S.Ct. at 2381. A rebuttable presumption, coupled with abuse-of-discretion review by this court, thus preserves district court discretion without allowing district courts to stray too far.

claims that are legitimate, but cost too much to litigate individually. Thus, denying class certification to claims that can be treated in the aggregate is equivalent to denying those claims on the merits. When the law has changed to recognize those claims as amenable to aggregate treatment, applying that change to give the new plaintiff an opportunity to represent the class makes sense. Moreover, since the change in the law has recognized a claim that would not otherwise have been viable, this is not a "second bite at the apple" of the sort animating claim preclusion principles. Instead, the change in the law has presented a different apple.

B. A Decision Which Applies Comity's Presumption of Correct Denial of Certification Should Be Reviewed on an Abuse of Discretion Standard

It is settled law that the decision to apply principles of comity is discretionary, not mandatory. *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1140 (9th Cir. 2001). Therefore, this court reviews a district court's decision to grant comity deference to a state or tribal court's determination of an issue for abuse of discretion. *Stock West Corp. v. Taylor*, 964 F.2d 912, 918 (9th Cir. 1992). This principle has been extended to comity to federal court decisions; a district court's decision to dismiss an action under the federal comity doctrine's "first to file" rule is reviewed for an abuse of discretion. *Barapind v. Reno*, 225 F.3d 1100, 1109 (9th Cir. 2000).

Since the district court's choice to apply principles of comity is discretionary, an abuse of discretion standard of review should be applied. Moreover, I see no justification for a *less* stringent standard of review

for a decision to give preclusive effect to the substance of an order than to the decision to defer to duplicative litigation as in the "first to file" context. Thus, I suggest adoption for use here of the familiar abuse of discretion standard: a district court abuses its discretion when it identifies the wrong legal standard for decision, or makes findings of fact (or applications of the facts it has found) that are "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *U.S. v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc).

III. This Case

Applying the framework enunciated above, I conclude that the rebuttable presumption that individual issues predominated over class-wide issues was rebutted here.

At the first step, Judge Martinez correctly applied comity's rebuttable presumption in favor of Judge Coughenour's earlier denial of class certification. At the second step, however, the district court erred by finding that *Wolin* was not a change in law that rebutted the presumption in favor of the earlier denial of class certification. The district court made this mistake because it misunderstood the grounds of Judge Coughenour's earlier denial of class certification.

Judge Martinez concluded that the presumption had not been rebutted because the *Gable/Wolin* Land Rover litigation was distinguishable from the scratched disc litigation. However, the language he quoted from Judge Coughenour's earlier denial was language justifying Judge Coughenour's conclusion that *Gable* could not be distinguished from the X-Box scratch case. *In re Microsoft Xbox 360 Scratched Disc Litigation*, 2009 WL 10219350, at *7 (W.D. Wash. Oct.

5, 2009) ("Plaintiffs attempt to distinguish *Gable*, but fail . . . The *Gable* court acknowledged that every Land Rover suffered the same design flaw, but nonetheless refused to certify the class, because the defect had not *manifested* in every Land Rover. That is exactly the case here."). Judge Martinez committed two errors of law. First, he read Judge Coughenour's earlier denial of class certification as based on a finding that the *Gable/Wolin* decision was distinguishable from the scratched disc litigation; to the contrary, Judge Coughenour had stated that the scratched disc and tire wear actions were not distinguishable. Second, it was legal error for him to defer to Judge Coughenour's denial of class certification in light of the change in law wrought by *Gable's* reversal in *Wolin*, as discussed fully in the majority opinion. Maj. Op. at 14–15.

Thus, Judge Martinez abused his discretion by granting comity deference to an earlier denial of class certification despite an intervening change in the law that should have rebutted the presumption in favor of that denial. Notably, Microsoft made no argument in the district court in support of the motion to strike other than reliance on comity; its arguments about the propriety of class treatment in this case were only to justify the "alternative relief" of denial of certification. Since the district court has not yet opined on whether plaintiffs' class should be certified, I agree that this issue should remain open on remand, where defendants will be free to renew their motion to deny certification.

IV. Conclusion

Our court should not misconstrue the district court rulings it reviews, and it should give guidance to district courts who face difficult questions of law. As the majority opinion does not satisfy either of these duties, I concur in its result, but not its reasoning.

APPENDIX B

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

[Filed 10/16/12]

No. 11-cv-00722-RSM

SETH BAKER, et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

STIPULATION AND ORDER GRANTING PLAINTIFFS' MOTION TO DISMISS WITH PREJUDICE

The Honorable Ricardo S. Martinez

STIPULATION

The parties, by and through their attorneys of record, stipulate to the Court's entry of the proposed Order set forth below, dismissing this case with prejudice, directing entry of judgment, and reserving questions of appealability. In support of this request, the parties represent the following:

1. Plaintiffs filed this action on April 28, 2011. *See* Dkt. 1.

2. On March 27, 2012, the Court entered its Order on Defendant's Motion to Strike Plaintiffs' Class Allegations, granting Microsoft's Motion to Strike. *See* Dkt. 32.

3. On June 12, 2012, the United States Court of Appeals for the Ninth Circuit entered an Order "in its discretion, den[ying] the [Plaintiffs'] petition for permission to appeal the district court's March 27, 2012 order."

4. On September 25, 2012, Plaintiffs filed a Motion to Dismiss with Prejudice. *See* Dkt. 35. In that Motion, Plaintiffs explained that "[a]fter the Court has entered a final order and judgment, Plaintiffs intend to appeal the Court's March 27, 2012 order (Dkt. 32) striking Plaintiffs' class allegations." *Id.*

5. Microsoft does not intend to oppose Plaintiffs' Motion to Dismiss because Fed. R. Civ. P. 41(a)(1)(A)(i) permits them to dismiss their case voluntarily. Microsoft does contend, however, that Plaintiffs will have no right to appeal the Court's Order striking Plaintiffs' class allegations after entry of their requested dismissal.

6. This Stipulation is not filed pursuant to a settlement agreement, nor was Plaintiffs' Motion to Dismiss filed pursuant to a settlement agreement. The parties have not entered into any settlement of Plaintiffs' claims.

7. Based on the foregoing, the parties stipulate and agree that the Court may enter the following Order dismissing this matter with prejudice, reserving to all parties their arguments as to the propriety of any

appeal. Any arguments as to the propriety of an appeal shall be addressed in the United States Court of Appeals for the Ninth Circuit, if and when Plaintiffs file a notice of appeal.

Respectfully submitted this 16th day of October, 2012.

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ORDER

Based on the foregoing Stipulation, the Court GRANTS Plaintiffs' Motion to Dismiss with Prejudice, with all parties to bear their own costs and fees. The Court hereby directs the Clerk to enter Judgment accordingly and close this case.

IT IS SO ORDERED.

DATED this 16 day of October, 2012.

/s/ Ricardo S. Martinez
RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

Presented By:

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